

The uncontested procedural history is as follows: An Alameda County Superior

1 Court jury convicted Petitioner of manslaughter and murder. Petitioner was sentenced to
2 six years plus nineteen years-to-life in prison. On August 4, 1998, the California Court of
3 Appeal affirmed the judgment. On November 18, 1998, the California Supreme Court
4 denied review.

5 Petitioner pursued three rounds of collateral challenges in the state courts. On
6 February 6, 2000, Petitioner filed his first petition for a writ of habeas corpus in the state
7 courts by signing the petition and sending it to the superior court. That petition was
8 denied on March 10, 2000. Petitioner's first round of state habeas petitions in the
9 California courts was ultimately denied in the California Supreme Court on September 13,
10 2000.

11 About five months later, on February 8, 2001, the cell of another prisoner, Nathan
12 Ellis, who had Petitioner's legal papers in his possession, was searched and legal papers
13 belonging to Petitioner were removed from his possession (Petitioner's Exhibit
14 "Declaration of: Nathan J. Ellis" in Petitioner's Opposition to Respondent's Motion to
15 Dismiss). That individual apparently continued to have some access to the papers that
16 were removed from his cell (Petitioner's Exhibit "Legal Property Log" in Opposition.)

17 Petitioner commenced his second round of collateral challenges by filing a petition
18 for a writ of habeas corpus in superior court on March 14, 2002 (which was signed by
19 Petitioner on March 10, 2002). This round of state collateral review ended on January 29,
20 2003.

21 Petitioner filed his federal habeas action on April 30, 2003. Petitioner filed his first
22 amended petition on August 19, 2003. Petitioner's third round of state collateral
23 challenges commenced after Petitioner moved this Court to stay proceedings while he
24 exhausted additional claims in state court on September 16, 2003 (docket no. 5). After
25 that round was completed by a denial from the California Supreme Court on June 29,
26 2005, Petitioner filed an amended petition on August 15, 2005, (docket no. 36), which is
27 currently the operative petition in this matter.
28

DISCUSSION

I. The Statute of Limitations

Respondent Attorney General moves to dismiss the petition as untimely. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) became law on April 24, 1996, and imposed for the first time a statute of limitations on federal petitions for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-capital state convictions or sentences now must be filed within one year from the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). Respondent argues that the present petition must be dismissed because it was not filed within one year of the date on which Petitioner's conviction became final.

The one-year period generally will run from "the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). "Direct review" includes the period within which a petitioner can file a petition for a writ of certiorari from the United States Supreme Court, whether or not the petitioner actually files such a petition. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999). Accordingly, if a petitioner fails to seek a writ of certiorari from the United States Supreme Court, AEDPA's one-year limitations period begins to run on the date the ninety-day period defined by Supreme Court Rule 13 expires. *See Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002) (where petitioner did not file petition for certiorari, his conviction became final 90 days after the California Supreme Court denied review); *Bowen*, 188 F.3d at 1159 (same).

Therefore, as Respondent points out, the one year period began to run in this case on February 16, 1999. Ordinarily, Petitioner would have until February 16, 2000 to file a timely petition. However, the federal petition was not filed until April 30, 2003, more than three years later. Therefore, the petition is untimely unless Petitioner can show that he is entitled to delayed commencement of the statute of limitations under §

2244(d)(1)(A)-(D), or that the statute of limitations was statutorily tolled under § 2244(d)(2), or that he is entitled to equitable tolling.

II. Delayed Commencement Under § 2244(d)(1)(B) and/or Statutory Tolling

In most cases, the one year limitations period will start on the date on which the judgment becomes final after the conclusion of direct review or the time passes for seeking direct review, but the limitations period may start on a later date. *See* 28 U.S.C. § 2244(d)(1)(A)-(D). Petitioner primarily argues that the seizure of his legal papers from another prisoner constitutes a state-imposed impediment which delayed commencement of the limitations period.

Section § 2244(d)(1)(B) allows for commencement of the statute of limitations on the date on which "an impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action." Petitioner contends that the actions of state officials in seizing his legal materials from another prisoner on February 8, 2001 constitutes an impediment to filing under § 2244(d)(1)(B) that should delay the commencement of the limitations period.

However, Petitioner's argument is without merit. Ordinarily § 2244(d)(1)(B) provides for the delayed commencement of the statute of limitations until an impediment to filing is removed, "if the applicant was prevented from filing by such state action[.]" Here, however, the impediment was not even created until more than one year after the limitations period set forth in § 2244(d)(1)(A) had passed. It would defy logic for § 2244(d)(1)(B) to re-commence the statute of limitations ordinarily in place under § 2244(d)(1)(A) when the impediment did not even exist until after more than a year had passed. While the Ninth Circuit has applied section 2244(d)(1)(B) to provide delayed commencement where prisoners have been impeded in their ability to file a habeas petition due to ongoing conduct on the part of state prison officials, *see, e.g., Whalem/Hunt v. Early*, 233 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (remanding case

1 to district court for development of facts concerning whether AEDPA materials were
2 unavailable in the prison law library and the legal significance of such a finding), this
3 Court finds no precedent for applying § 2244(d)(1)(B) to delay the commencement of the
4 limitations period when the alleged impediment did not exist until more than one year
5 after the date on which the judgment became final under § 2244(d)(1)(A).

6 In this case, Petitioner contends that he filed his first state collateral challenge on
7 February 6, 2000, only 11 days before the one year limitations period would have
8 expired under § 2244(d)(1)(A). Under 28 U.S.C. § 2244(d)(2), the time during which a
9 properly filed application for State post-conviction or other collateral review is pending
10 does not count toward the one year limitations period. *See Carey v. Saffold*, 536 U.S.
11 214, 219-20 (2002). Until the state habeas application has achieved final resolution
12 through the State's post-conviction procedures, by definition it remains "pending." *Id.* at
13 220. In California, this means that the statute of limitations is tolled from the time the
14 first state habeas petition is filed until the California Supreme Court rejects the
15 petitioner's final collateral challenge, as long as the petitioner did not "unreasonably
16 delay" in seeking review. *Id.* at 221-23.

17 The Ninth Circuit has held in *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999)
18 that an application for collateral review is "pending" in state court for "all of the time
19 during which a state prisoner is attempting, through proper use of state court procedures,
20 to exhaust state court remedies with regard to a particular post-conviction application."
21 *Nino* held that the limitation period "remains tolled during the intervals between the state
22 court's disposition of a state habeas petition and the filing of a petition at the next state
23 appellate level." This means that a state habeas petition is pending while a California
24 petitioner "complete[s] a full round of [state] collateral review" all the way to the
25 California Supreme Court. *Biggs v. Duncan*, 339 F.3d 1045, 1048 (9th Cir. 2003)
26 (citation and internal quotations marks omitted).

27 However, if there is any gap between the completion of one round of review and
28

1 the commencement of another round of state habeas review, the petitioner is not entitled
2 to tolling during the gap. *See Delhomme v. Ramirez*, 340 F.3d 817, 819-20 (9th
3 Cir.2003) at 821; *Biggs*, 339 F.3d at 1046-47, 1048; *see also Dils v. Small*, 260 F.3d 984,
4 986 (9th Cir. 2001) (not tolling limitation period during gap between successive state
5 habeas petitions filed in the state's highest court); *Smith v. Duncan*, 297 F.3d 809, 814-15
6 (9th Cir. 2002) (when calculating tolling period, excluding gap between first set of state
7 habeas petitions (superior court, court of appeal and supreme court) and second set of
8 state habeas petitions (superior court, court of appeal and supreme court)). Tolling under
9 § 2244(d)(2) ends thirty days after the Supreme Court of California's denial of the final
10 habeas petition is filed because that is when the denial becomes "final" under California
11 Rule of Court 24. *Allen v. Lewis*, 295 F.3d 1046, 1046 (9th Cir. 2002) (en banc)
12 (reaffirming *Bunney v. Mitchell*, 262 F.3d 973, 974 (9th Cir. 2001)).¹

13 Even assuming that Petitioner would be entitled to statutory tolling for the time
14 during which he alleges that his state collateral challenges were pending, this time does
15 not adequately toll the limitations period to make the petition timely. Petitioner alleges
16 that the first round of state collateral challenges was completed on September 13, 2000.
17 At that time, only eleven days remained of the one year limitations period.

18 However, at the time that the alleged impediment to filing was created by the
19 seizure of his legal papers on February 8, 2001, close to five additional months had
20 passed since the first round of collateral challenges had been completed and Petitioner
21 had neither filed a federal petition nor initiated another round of state collateral
22 challenges. Approximately four months of this time period (from 30 days after the
23 California Supreme Court's denial in Petitioner's first round of state collateral
24

25 ¹The rationale of *Allen v. Lewis* only applies to denials of the Supreme Court of California
26 filed before January 1, 2003. On January 1, 2003, the Supreme Court of California made clear
27 that its orders denying a petition for a writ of habeas corpus within its original jurisdiction are
28 final on filing. *See* Cal. Rule of Court 29.4(b)(2)(C).

1 challenges) would not be tolled. This period also occurred prior to the creation of the
2 impediment upon which Petitioner bases his argument for delay of the commencement of
3 the limitations period. Therefore, at the time of the creation of the impediment, the one
4 year limitations period under § 2244(d)(1)(A) had already expired, and does not appear
5 to have been extended by statutory tolling.

6 While Petitioner's exhibits also suggest that Petitioner's "Jailhouse lawyer"
7 continued to have access to the documents of Petitioner's at the prison, even though they
8 were no longer in his possession (see, "Legal Property Log" Exhibit in support of
9 Petitioner's opposition), it is not necessary for this Court to determine whether this
10 seizure would have actually constituted an impediment under § 2244(d)(1)(B) had it not
11 happened after the limitations period had already expired.

12 Because the statute of limitations already had expired by the time the alleged
13 impediment came into existence, the impediment created thereafter cannot have had an
14 impact on Petitioner's failure to file a timely petition. *Cf. Ferguson v. Palmateer*, 321
15 F.3d 820, 823 (9th Cir. 2003) (state habeas petition filed *after* AEDPA's statute of
16 limitations ended cannot toll the limitation period); *Jimenez v. Rice*, 276 F.3d 478, 482
17 (9th Cir. 2001). Accordingly, Petitioner is not entitled to delayed commencement of the
18 statute of limitations under § 2244(d)(1)(B) based on the seizure of his legal papers on
19 February 8, 2001.

20 **III. Equitable Tolling**

21 Finally, the Court considers whether Petitioner is entitled to equitable tolling of
22 the limitations period, which is available upon a showing that a petitioner has been
23 pursuing his rights diligently and that extraordinary circumstances beyond his control
24 prevented him from timely filing the petition. *Pace v. DiGuglielmo*, 544 U.S. 408, 418-
25 19 (2005). "When external forces, rather than a petitioner's lack of diligence, account for
26 the failure to file a timely claim, equitable tolling of the statute of limitations may be
27 appropriate." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). The prisoner must
28

1 show that “the ‘extraordinary circumstances’ were the cause of his untimeliness.”
2 *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003) (citations omitted).

3 The Ninth Circuit has held that the petitioner bears the burden of showing that this
4 "extraordinary exclusion" should apply to him. *Miranda v. Castro*, 292 F.3d 1063, 1065
5 (9th Cir. 2002). The petitioner must establish two elements in order to be granted
6 equitable tolling: “(1) that he has been pursuing his rights diligently, and (2) that some
7 extraordinary circumstance stood in his way.” *Raspberry v. Garcia*, 448 F.3d 1150,
8 1153 (9th Cir. 2006) (quoting *Pace*, 544 U.S. at 419); *see Pace*, 544 U.S. at 419
9 (petitioner's lack of diligence in filing timely state and federal petitions precluded
10 equitable tolling).

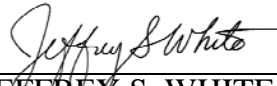
11 Petitioner does not appear to raise equitable tolling in defense of the delays in the
12 filing of his petition. However, for the reasons already discussed, because more than one
13 year of time that was not tolled had already passed before the alleged seizure of his legal
14 papers, this incident did not prevent Petitioner from filing a timely petition. Therefore,
15 Petitioner cannot show that the ‘extraordinary circumstances’ were the cause for the
16 delay. *Spitsyn*, 345 F.3d at 799. Because Petitioner has not established that the
17 limitations period should be delayed by a state created impediment or that he is entitled to
18 statutory or equitable tolling, the petition is barred by the statute of limitations and must
19 be dismissed.

20 CONCLUSION

21 Respondent’s motion to dismiss is GRANTED (docket no. 39). The petition for
22 writ of habeas corpus is hereby DISMISSED. The Clerk shall enter judgment and close
23 the file. This order terminates all pending motions.

24 IT IS SO ORDERED.

25 DATED: December 19, 2006

26 
JEFFREY S. WHITE
United States District Judge